LIBRARY
SUPREME COURT, U.S.

FILED
JUN 29 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965.

No. 209.

McCLOSKEY & CO., INC.,

Petitioner,

v.

N. L. WYMARD and GEORGE L. STARK, RECEIVERS OF KEMMEL & CO., INC., Debtor,

Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

EDWARD COHEN,
226 South 16th Street,
Philadelphia, Pa. 19102,
Counsel for Respondents.

LARRICK B. STAPLETON,
DAVID ROSEN,
624 Transportation Center,
Six Penn Center Plaza,
Philadelphia, Pa. 19103,
LESTER H. NOVACK,
226 South 16th Street,
Philadelphia, Pa. 19102,
Of Counsel.

June 25, 1966.

Hennegan Printing Corp., *Appellate Printers*, Camden, N. J.

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Question Presented	3
Statutes Involved	4
Statement	4
Argument	7
I. The Decision Below Correctly Followed Unanimous Precedents Sustaining Inherent Original Federal Jurisdiction	9
II. There is no Important Question of Federal Law	15
Conclusion	18

CITATIONS

CASES:

In re Berry, 247 Fed. 700 (S. D. Mich.)	12
Blackburn v. Alabama, 361 U. S. 199	16
Carnley v. Cochran, 369 U. S. 506	16
Detroit Trust Co. v. Pontiac Sav. Bank, 196 Fed. 29 (6th Cir.)	12
Emspak v. United States, 349 U. S. 190	16
Fay v. Noia, 372 U. S. 391	16

PAGE

Foodtown of Oyster Bay v. Dilbert's Leasing & Dev. Corp., 334 F. 2d 768 (2d Cir.) 14

Gibbs v. Burke, 337 U. S. 773 16
Green v. United States, 355 U. S. 184 16

Harris v. Standard Acc. & Ins. Co., 297 F. 2d 627 (2d Cir.) 12, 13
Herman v. Claudy, 350 U. S. 116 16

Johnson v. Zerbst, 304 U. S. 458 16

Labor Board v. Lion Oil Co., 352 U. S. 282 16

MacDonald v. Plymouth County Trust Co., 286 U. S. 263 ..... 10, 12
May v. Moss, 194 F. 2d 133 (8th Cir.) 12
McEldowney v. Card, 193 Fed. 475 (E. D. Tenn.) .. 12
Moonblatt v. Kosmin, 139 F. 2d 412 (3d Cir.) 14
Moore v. Michigan, 355 U. S. 155 16

In re Petroleum Conversion Corp., 99 F. Supp. 899 (D. Del.) 14

Quinn v. United States, 349 U. S. 155 16

In re Read-York, 152 F. 2d 313 (7th Cir.) 12

St. Regis Paper Co. v. United States, 368 U. S. 208 .. 16
Schumacher v. Beeler, 293 U. S. 367 .....9, 10, 12, 13, 16
Seegmiller v. Day, 249 Fed. 177 (7th Cir.) 12

Toledo Fence & Post Co. v. Lyons, 290 Fed. 637 (6th Cir.) 12

Uveges v. Pennsylvania, 335 U. S. 437 16

Williams v. Austrian, 331 U. S. 642 .....11, 12

INDEX

STATUTES:

	PAGE
Bankruptcy Act:	
§2(a)(7)	4, 7, 8, 10
§23(b)	3, 4, 7, 8, 10, 11, 13, 14, 17
11 U. S. C. §11(a)(7)	4, 7, 10
11 U. S. C. §46(b)	3, 4, 7, 13
28 U. S. C. §1334	4, 9

MISCELLANEOUS:

Const., Art. 3, §2	9
F. R. Civ. P. Rule 8(a)	13
House Report No. 2320, 82d Cong., 2d Sess. (1952)	14

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 203.

McCLOSKEY & CO., INC.,

Petitioner,

v.

N. L. WYMARD AND GEORGE L. STARK, RECEIVERS OF KEMMEL & CO., INC., DEBTOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court on the merits is reported at 217 F. Supp. 143. The opinion of the District Court upon the question of jurisdiction is reported at 234 F. Supp. 706.

The opinions of the Court of Appeals for the Third Circuit on the merits and on the question of jurisdiction (Appendix A of Petition) are reported at 342 F. 2d 495.

The prior opinions of both Courts rendered with respect to Petitioner's application for a stay are reported at 190 F. Supp. 420 and 292 F. 2d 839.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

In a plenary suit brought by receivers in bankruptcy in a United States District Court, do the acts of the defendant in filing an answer on the merits, a counterclaim demanding affirmative relief, a supplemental answer, pre-trial memoranda, attending pre-trial conferences and four days of trial on the merits, thereafter filing requests for findings of facts and conclusions of law, motions for directed verdicts and motion for a new trial, constitute consent to the jurisdiction of that Court within the meaning of §23(b) of the Bankruptcy Act, 11 U. S. C. 46(b)?

STATUTES INVOLVED.

The pertinent provisions of the Bankruptcy Act—§2(a)(7), 11 U. S. C. §11(a)(7) and §23(b), 11 U. S. C. §46(b)—are set forth in the Petition at pp. 3-4.

In addition, further pertinent to the issue before this Court is §1334 of the Judicial Code of 1948, 28 U. S. C. §1334, which provides:

> "The district courts shall have original jurisdiction, exclusive of the courts of the States, of all matters and proceedings in bankruptcy."

STATEMENT.

On March 2, 1960, the respondents, N. L. Wymard and George L. Stark, appellees below, were appointed receivers in bankruptcy of Kemmel & Co., Inc., a painting contractor, hereinafter referred to as "Kemmel", by order of the United States District Court for the Eastern District of Pennsylvania. Two months later the designated Referee in Bankruptcy issued a special order authorizing and directing the respondents to bring a plenary suit in the District Court for the recovery of compensation owing the bankrupt Kemmel for painting work performed by it for petitioner during the course of construction of a defense housing project at Fort George Meade, Maryland.

Accordingly, on June 6, 1960, respondents, in their capacity as receivers in bankruptcy, filed suit against the petitioner and in their complaint recited the following opening allegations appertaining to jurisdiction:

"1. N. L. WYMARD and GEORGE L. STARK were, by Order of this Court, dated March 2, 1960, appointed receivers of KEMMEL & CO., INC., Debtor Plaintiff in the above entitled matter and have duly qualified and are now acting in such capacity as receivers.

"2. On May 2, 1960 Plaintiffs obtained an Order of the Referee in Bankruptcy permitting them to sue the above named McCLOSKEY & CO., INC., Defendant, by reason of the facts more fully set forth herein."

On June 27, 1960, petitioner, duly represented by counsel, entered a general appearance in the action. Petitioner contemporaneously invoked the jurisdiction of the District Court by filing a motion to stay the proceedings in an effort to compel the submission of the matter to arbitration on the merits, which such motion is not now suggested and has never been held to have constituted anything other than an invocation and recognition of the jurisdiction of the Federal Court. See, Opinions of the Court of Appeals, 342 F. 2d, at pp. 498, 500 (Appendix to Petition, pp. A4, A9).

Upon dismissal of this motion by the District Court, 190 F. Supp. 420, and a sustaining of that dismissal by the Court of Appeals, 292 F. 2d 839, petitioner proceeded to the filing of an answer to the merits of respondents' complaint, and further filed a counterclaim against the bankrupt's estate demanding affirmative relief in the amount of some $249,804.29 upon an alleged loan claimed to have been owing by Kemmel.

Petitioner then filed a supplemental answer to the complaint, submitted pre-trial memoranda, attended a pre-trial conference, and on April 24, 1963, proceeded to a trial on the merits which extended over a period of four days, during which some 545 pages of testimony were taken, touching upon all claims and contentions of both litigants. On May 3, 1963, petitioner filed its second motion for a directed

verdict as to respondents' complaint and petitioner's own counterclaim, and on the same date, both petitioner and respondents filed their requests for findings of fact and conclusions of law.

Petitioner subsequently filed supplemental requests for findings of fact and conclusions of law, motions for directed verdicts, a motion for judgment and a motion for a new trial, each of which was denied by the District Court. On May 13, 1963, the District Court entered its judgment in favor of respondents in the amount of $271,346.37, and summarily dismissed petitioner's counterclaim. Petitioner then filed its appeal in the Court of Appeals for the Third Circuit, such appeal being directed wholly and exclusively to the merits.

At no point during the exhaustive proceedings prior to trial, or in the comprehensive trial of the cause and the counterclaim, the replete post-trial applications of petitioner or even in the appeal on the merits, did the petitioner question in any manner the jurisdiction of the District Court to have heard and disposed of either the suit or its countersuit. The first and only suggestion of a possible want of jurisdiction was raised by the Court of Appeals, *sua sponte*, at the time of the initial oral argument on the petitioner's appeal on the merits (April 7, 1964).

On June 18, 1964, the Court of Appeals thereupon entered an order vacating the judgment with leave to respondents to amend their pleading of jurisdiction in their complaint. Upon motion of the respondents, a rehearing was granted before the Court en banc, wherein the initial remand was superseded by a supplemental order directing the District Court to conduct additional proceedings with respect to the question of jurisdiction.

On October 8, 1964, the District Court thereupon concluded, *as a matter of fact*, that the petitioner, by virtue of its consistent acquiescence and positive participation in

the proceeding, its invocation of the jurisdiction of the Court to determine its right to arbitration and to try its counterclaim, had fully and completely consented to the jurisdiction of the District Court within the scope and meaning of §23(b).

On certification of this order and opinion to the Court of Appeals en banc, that Court affirmed this factual determination of the District Court, and further affirmed the decision of the District Court on the merits, after exclusion of that portion of the judgment representing overhead charges under the oral modification agreement.

ARGUMENT.

The primary legal and jurisdictional premises of the present case, and all precedent bankruptcy cases, sustained by the majority and concurring opinions of the Court below (Appendix to Petition, pp. A1-A9) are: (1) that §2(a)(7) of the Bankruptcy Act, 11 U. S. C. §11(a)(7), confers upon the District Courts of the United States exclusive original jurisdiction in bankruptcy matters; and (2) that §23(b), 11 U. S. C. §46(b), of the Act continues that jurisdiction in plenary suits brought by receivers and trustees in bankruptcy whenever the defendant manifests any form of consent thereto.

The Court below thereupon sustained the factual determination of the District Court that the above described acts of petitioner in the course of active participation in the four years of exhaustive litigation of this case—*as a matter of fact*, 234 F. Supp., at pp. 707-08—constituted a binding manifestation of such consent to jurisdiction under §23(b), *and*, of even greater moment, that petitioner had, for self-

serving reasons (in pursuing its counterclaim) affirmatively invoked the jurisdiction of that Court.

Confronting these essential findings of the Courts below, petitioner presents as its sole basis for granting of certiorari the issue whether this Court should, for the first time in the development of the law of bankruptcy jurisdiction, inquire into the subjective nature and quality of unequivocal acts of consent in jurisdiction otherwise manifestly within the scope of §23(b). Avoiding any considered reference to those unanimous controlling authorities that would otherwise compel the sustaining of the findings below, petitioner bases this unexampled issue solely upon the relevancy of a purported semantic similarity between consensual conduct in bankruptcy jurisdiction and the conditions under which a criminal accused may waive and forfeit his fundamental constitutional protections.

Petitioner therein and thereby most significantly no longer questions that §23(b) sustains the otherwise exclusive original jurisdiction vested within the District Court by §2(a)(7) whenever a bankrupt's defendant, by failing timely to withhold consent in a plenary suit brought in the Federal Court, forfeits his extraordinary option to deflect the controversy to a state tribunal. Nor does petitioner either deny that it did in fact perform each and all of those acts found by the District Court to have constituted such consent to its jurisdiction. Considering then petitioner's—(1) unqualified admission of its awareness of the full import of §23(b) (Petition, p. 12) when it performed such acts; (2) its singular avoidance of even allusory reference to the unexcepted line of Federal authorities, which have consistently determined the existence of consent under §23(b) as the result of the judicial acts of a litigant, without reference to their subjective quality; (3) the manifest concession of the total absence therein of any conflict among the various Courts of Appeals; (4) the implied concession

of an absolute want of any effect of the petition upon any other cause or litigant or upon any issue relating to the allocation of powers between the Federal Government and the states—the only basis remaining for the writ could be no more than a deigned compelling necessity for sanction of petitioner's unique analogy between substantive constitutional protections and a procedural privilege. The foregoing concessions and omissions, which were the essential premises of the statutory jurisdiction sustained below and which are indispensable premises of any syllogism proceeding from those statutes, are, as well, dispositive of petitioner's analogy.

I.

THE DECISION BELOW CORRECTLY FOLLOWED UNANIMOUS PRECEDENTS SUSTAINING INHERENT ORIGINAL FEDERAL JURISDICTION.

From the inception of our judicial system, Federal Courts have been granted an unexcepted and universal original jurisdiction over the estates and matters of bankrupts. This power, deriving from Article 3, Section 2 of the Constitution, is presently set forth in §1334 of the Judicial Code of 1948, which provides that:

> "The district courts shall have original jurisdiction, exclusive of the courts of the States, of all matters and proceedings in bankruptcy."

Having thereby the power to grant whole and exclusive jurisdiction over bankruptcy matters, plenary and summary, to the Federal Courts, *Schumacher v. Beeler,* 293 U. S. 367, 374, the Congress has explicitly provided for

the assumption of such jurisdiction in §2(a)(7) of the Bankruptcy Act, 11 U. S. C. §11(a)(7), which creates the Federal Courts as courts in bankruptcy and specifically invests them with the power to collect and hear all controversies relating to bankrupt estates ". . . except as herein otherwise provided." The qualification last noted was inserted by the Act of 1898, to append to the previously absolute exclusive jurisdiction of the Act of 1867 the contemporaneous initial provision of §23(b) which then and now further provides that:

> "Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have been brought or prosecuted them if proceedings under this title had not been instituted, *unless by consent of the defendant.* . . ." (Emphasis supplied.)

Thus, bankrupts' adversaries in 1898 acquired the unique option, wholly procedural in nature, *MacDonald v. Plymouth County Trust Co.*, 286 U. S. 263, 266-67, to secure a hearing in a State Court if they duly exercised the privilege not to consent to be sued in the Federal Courts, where all bankruptcy suits theretofore alone were required and permitted to be heard. Section 23(b), in limiting the theretofore unrestricted Federal jurisdiction over suits brought by bankruptcy receivers and trustees, contemporaneously granted and continued such jurisdiction subject to the condition that the defendant manifest its consent thereto. The congressional intent so embodied in §23(b) was interpreted and explained in the landmark decision of *Schumacher v. Beeler*, 293 U. S. 367, 374, wherein the Court stated:

> ". . . The Congress, by virtue of its constitutional authority over bankruptcies, could confer or withhold

> jurisdiction to entertain such suits and could prescribe the conditions upon which the federal courts should have jurisdiction. (Citation omitted.) Exercising that power, the Congress prescribed in §23b the condition of consent on the part of the defendant sued by the trustee. *Section 23b was thus in effect a grant of jurisdiction subject to that condition.*" (Emphasis supplied.)

Petitioner's essential position that such inherent jurisdiction in the event of consent ought to be operative only if that consent was by "conscious" "knowing" "choice" proceeds from the untenable presumption that it is the consent, initially, whatever its character, that creates the jurisdiction. The statutes which prescribe jurisdiction (acknowledged by petitioner only by characterization as "unprofitable" and "unhelpful"), however, clearly provide for a consent that is neither the engine nor a condition of jurisdiction but only an extraordinary procedural option to exercise a choice of one of two co-equal jurisdictional powers. Consent therefore being only a contingent limitation rather than a necessary condition of jurisdiction, *Williams v. Austrian*, 331 U. S. 642, it would go without citation of authority that even if unfettered "consciousness" or crystalline clarity of "choice" were a standard of its election of jurisdiction under §23(b), the petitioner's sustained invocation of the power of the Federal Courts in this case, extending over a period of four years to include every substantive and procedural device for relief available in any court, could but be construed as conduct sufficient to constitute the acceptance and acknowledgment under that section of the pre-existent jurisdiction of the Court.

Reference to the settled line of Federal authorities indeed so discloses that it has consistently been held that any explicit or tacit, affirmative or acquiescent act of a bankrupt's

defendant incompatible with an unequivocal denial of the jurisdictional power of a Federal bankruptcy court will constitute a binding consent to that power and a concommitant waiver of the right thereafter to elect instead the merely co-equal jurisdictional power of a State tribunal. See: that the mere entry of appearance is sufficient to constitute binding jurisdictional consent, *In re Read-York*, 152 F. 2d 313, 317 (7th Cir.), *Toledo Fence & Post Co. v. Lyons*, 290 Fed. 637, 640 646 (6th Cir.), *In re Berry*, 247 Fed. 700, 704 (S. D. Mich.), *Detroit Trust Co. v. Pontiac Sav. Bank*, 196 Fed. 29, 32 (6th Cir.), and *McEldowney v. Card*, 193 Fed. 475 (E. D. Tenn.); that answer to the merits will alone suffice, *May v. Moss*, 194 F. 2d 133, 137 (8th Cir.), *In re Read-York*, supra, *Seegmiller v. Day*, 249 Fed. 177 (7th Cir.), *In re Berry*, supra, *Toledo Fence & Post Co. v. Lyons*, supra, *Detroit Trust Co. v. Pontiac Sav. Bank*, supra, *McEldowney v. Card*, supra; particularly, that the seeking of affirmative cross relief by the filing of a counterclaim is separably an irrevocable consent, *May v. Moss*, supra, *In re Read-York*, supra; and, that *any* participation in a proceeding in Federal Court, even in the absence of any suggestion of any basis for its inherent bankruptcy jurisdiction, is a binding tacit act of consent, *Schumacher v. Beeler*, 293 U. S. 367 (where there was no pleading or notice of any nature of the jurisdictional basis), *Williams v. Austrian*, 331 U. S. 642, and *Harris v. Standard Acc. & Ins. Co.*, 297 F. 2d 627, 629-30 (2nd Cir), cert. den., 369 U. S. 843.[1] For the courts otherwise to have interpreted a de-

---

[1] That exercise of the option of §23(b) is binding without regard to the quality of apprehension thereof by a bankrupt's defendant is strikingly settled in the recent decision in **Harris v. Standard Acc. & Ins. Co.**, where, under pleadings even less embodying reference to the presence of rights under the Bankruptcy Act (there being an averment by the trustees only of their appointment) it was most recently and again determined that tacit conduct constituted irrevocable consent. The Court there observed:

fendant's acts of acquiescence in and invocation of jurisdiction under §23(b) would, of course, result in the dilemma unanswered by petitioner that a procedural option would become a unilateral right vested solely in it alone to void a concededly correct judgment of a competent forum whenever disappointment in factual determinations followed that consent.

"The record does not disclose facts upon which diversity jurisdiction could rest. The complaint alleges only that the plaintiff-trustee in bankruptcy is a citizen of New York, that the defendant Standard is incorporated in Michigan, and that more than $10,000 is in controversy. **The district court did not discuss jurisdiction nor did the parties' briefs on this appeal.** According to the Bankruptcy Act, §23, 11 U. S. C. A. §46, the citizenship of the bankrupt and not that of the trustee is relevant in determining diversity. Moreover, under 28 U. S. C. §1332(c) which applies to suits commenced after July 25, 1958, a corporation is deemed a citizen of the state wherein is located its principal place of business. Although this action was filed on October 15, 1958, there is no allegation as to Standard's principal place of business. Therefore, the facts necessary to diversity jurisdiction both as to the bankrupts and Standard are lacking. Nevertheless, the district court had jurisdiction on another basis. The Bankruptcy Act, §23, sub. b, 11 U. S. C. A. §46, sub. b, gives federal courts jurisdiction over all suits brought by a trustee in bankruptcy if the defendant consents. See Schumacker (sic) v. Beeler, 293 U. S. 367, 55 S. Ct. 230, 79 L. Ed. 433 (1934). **The courts have held that a defendant consents if he argues the merits without objection to jurisdiction."** 297 F. 2d, at pp. 629-30. (Emphasis supplied.) (Citations omitted.)

Even were this summarization of the relevant decisions not dispositive of petitioner's inference of applicability of Rule 8(a) of the Federal Rules of Civil Procedure in support of its novel theory (Petition, pp. 5 and 12), it would remain that the instant complaint exceeded that of the **Harris** pleading by further averring that suit was brought upon express order of the Referee in Bankruptcy (Para. 2 of complaint). Petitioner has not only avoided acknowledgment that Rule 8(a) and its identical predecessor, Equity Rule 25, have been effective during the development of all adverse authority and that the pleadings in none of the precedents ever gave notice to a defendant that §23(a) would be relied upon, but avoids any response to the therefore inevitable conclusion below that petitioner's more extensive pleading clearly ". . . asserted facts enough to disclose . . . jurisdiction . . . under the Bankruptcy Act." 342 F. 2d, at p. 498 (Appendix to Petition, p. A5). See also, 342 F. 2d, at p. 497 (Appendix to Petition, p. A3).

That such anomaly would result from consideration of any impairment of its "consciousness" of the exercise of its §23(b) option, perceived of necessity only after final judgment of a Federal Court, was regarded dispositive of petitioner's argument by Freedman, J., of the Court of Appeals, in the concurring opinion joined by all members of the majority, when it was observed:

> "[Petitioner's theory] would approve the anomalous result that at this stage of a case such as this a plaintiff would be at the mercy of the defendant. For whenever, as here, the defendant had lost on the merits, he would decline to give express consent and thus defeat the judgment against him, yet if he had won, he could express consent and thereby ratify the judgment." 342 F. 2d, at p. 500 (Appendix to Petition, p. A9).

By reason of this inescapable consequence of petitioner's argument, it has been specifically further held in all the cases involving summary jurisdiction in Chapter XI proceedings that failure to interpose prompt unequivocal objection at the very outset of a summary hearing is an irrevocable waiver of objection to summary jurisdiction. See, *Moonblatt v. Kosmin*, 139 F. 2d 412 (3d Cir.), *In re Petroleum Conversion Corp.*, 99 F. Supp. 899 (D. Del.), aff'd per cur., 196 F. 2d 728 (3d Cir.), cert. den. sub. nom. *Vaughan v. Petroleum Conversion Corp.*, 344 U. S. 917, *Foodtown of Oyster Bay v. Dilbert's Leasing & Dev. Corp.*, 334 F. 2d 768 (2d Cir.). See, House Report No. 2320, 82d Cong., 2d Sess. (1952). That any lesser result could obtain to election of forum in a plenary suit goes as well without answer by petitioner.

Conceding both its awareness and chargeability and the unquestioned applicability of the statutes creating both the

exclusive jurisdiction and the privilege of avoiding it, petitioner is now asking this Court no less than to treat bankruptcy jursdiction as a subjective and antecedent personal choice of an unsuccessful defendant rather than as a vested power sustaining upon any submission to or solicitation of its exercise. That such a result cannot obtain is manifest upon the face of those statutes, is made certain by their unanimous interpretation in all relevant precedent, and is logically inescapable if the inherent jurisdictional power over which petitioner had but an option of preference is to have any meaning. As the majority below so aptly concluded (Appendix to Petition, p. A5), 342 F. 2d, at p. 498:

> "... The [petitioner] has availed itself of the opportunity to present its case, both defense and counterclaim, in the federal forum and the matter has proceeded to final judgment. Certainly, a judgment for the defendant, on claim or counterclaim, would have been binding upon the plaintiff. It would serve no worthwhile purpose to permit the unsuccessful defendant now to avoid the outcome of this fully litigated case."

II.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

The thrust of the instant petition would suggest an important question of federal law is at stake, equivalent in stature to the jealous preservation by the Court of immutable safeguards and guarantees afforded to accused individuals by our Constitution. We have herein noted that all of the authorities cited by petitioner concern themselves

wholly with the ultimate protection of the accused in criminal and quasi-criminal cases by this Court after one or more of such safeguards had been so abridged or abrogated as to cause irrevocable substantive prejudice.[2]

In placing its reliance solely upon such "waiver" decisions, petitioner seeks to equate the standards of denial of guarantees of due process with the procedural appendage of a privilege exercisable under §23(b) for no more than the "greater convenience of [non-diverse trustees' defendants and their] witnesses". *Schumacher v. Beeler*, 293 U. S. 367, 374. Any such attempted correlation of the guarantees of life and liberty must fail for disparity of context. Each and all of the authorities relied upon by petitioner do in fact hold, as by their context they must, that waiver of inviolable guarantees can only be by the in-

---

[2] The waivers of constitutional right considered by the authorities relied upon by petitioner, in the order of their citation, concerned: denial of the right of counsel—even when expressly invoked, **Johnson v. Zerbst**, 304 U. S. 458; for an "inexperienced youth," **Uveges v. Pennsylvania**, 335 U. S. 437; a youth of only six years' schooling, **Herman v. Claudy**, 350 U. S. 116; an insane 17-year old, **Moore v. Michigan**, 355 U. S. 155; an illiterate child molester convicted upon unobjected impeachable testimony, **Carnley v. Cochran**, 369 U. S. 506; and for a defendant convicted upon incompetent and hearsay evidence in a trial corroded by extensive additional prejudice, **Gibbs v. Burke**, 337 U. S. 773.

The abridgement of the proscription against self-incrimination, **Emspak v. United States**, 349 U. S. 190; **Quinn v. United States**, 349 U. S. 155.

The admission of involuntary confessions, **Blackburn v. Alabama**, 361 U. S. 199, and, the bar against double jeopardy, **Green v. United States**, 355 U. S. 184.

The three further cases cited, although not involving primary emphasis on proscriptions on the prosecutionary power, are similarly disparate: **Fay v. Noia**, 372 U. S. 391, involving the requisite of exhaustion of state court review of an admittedly coerced confession; **Labor Board v. Lion Oil Co.**, 352 U. S. 282, involving a "waiver" of the right of strike after termination of a labor contract; and, **St. Regis Paper Co. v. United States**, 368 U. S. 208, involving proscription of anti-trust investigatory powers of the F. T. C. under §9 of the Census Act.

telligent, unfettered, conscious and knowing act of a citizen afforded their protection. The civil defendant in bankruptcy, however, has not an inviolate right of selection of his forum, but only a procedural privilege that however exercised will and can in no way affect or touch upon his substantive rights, his liberties or properties. There is no conceivable similarity between substantive standards protecting unrepresented, uneducated, incompetent and impoverished criminal defendants, or harassed groups of workmen denied their collective rights, or business concerns subject to manifest abuse of investigatory sanctions, and the withholding of a hindsight choice of civil forums from a defendant represented by a battery of able, experienced counsel now sought to be made by reason of a defect of "conscious" appreciation of the possible adverse results on the merits.

Petitioner must but concede, therefore, that whatever its initial "awareness" of the full application or "conscious" appreciation of the import of §23(b), it had in fact available to it and exercised every conceivable means of hearing and review open to any civil litigant, including the litigation of its counterclaim, in the District Court. At no point does petitioner complain that any substantive right obtaining to it in the Federal Court in reaching an acknowledgedly proper judgment was denied or in any way rendered of lesser quality than any similar right which could have obtained in a State Court; there is no contention that prejudice of petitioner's rights followed from its insular confusion in choosing to proceed in a Federal Court. The only possible unfavorable consequence of petitioner's exhaustion of the whole spectrum of its substantive and adjective rights in the District Court was no more or less than that after the due adjudication of its defenses and counterclaim a disappointing judgment was entered against it.

We fail to perceive, then, any important Federal ques-

tion applicable to the case at hand, raised by the theory of the petition or the constitutional authorities cited therein. It is appropriate that rather than having "disregard[ed] a general legal principle that this Court has consistently . . . applied" (Petition, p. 13), the Courts below, as this very Court has done in all comparable cases, have only applied the procedural law of bankruptcy to petitioner, as with other bankruptcy litigants, and have left substantive constitutional prescriptions to their guaranteed.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

EDWARD COHEN,
226 South 16th Street,
Philadelphia, Pa. 19102,
Counsel for Respondents.

LARRICK B. STAPLETON,
DAVID ROSEN,
624 Transportation Center,
Six Penn Center Plaza,
Philadelphia, Pa. 19103,
LESTER H. NOVACK,
226 South 16th Street,
Philadelphia, Pa. 19102,
Of Counsel.

June 25, 1965.